TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~284~~ 1862

THE UNITED STATES, PLAINTIFFS,

vs.

ORESTES A. KEEHLER, AND THEODORE F. KEEHLER, AND THEODORE F. KEEHLER, AND M. M. KEEHLER, EXECUTOR AND EXECUTRIX OF C. D. KEEHLER, DECEASED.

CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH CAROLINA.

FILED OCTOBER 16, 1867.

SUPREME COURT OF THE UNITED STATES.

No. 264.

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1 UNITED STATES OF AMERICA,
North Carolina district:

At a circuit court of the United States began and held at Raleigh, for the district of North Carolina, on Monday, the third day of June, in the year of our Lord one thousand eight hundred and sixty-seven, and in the ninety-first year of American independence.

Present, the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, and the honorable George W. Brooks, judge of the district court of the United States for the district of North Carolina.

State of the pleadings.

UNITED STATES OF AMERICA
v.
ORESTES A. KEEHLER, & THEODORE F. KEEHLER, & Theodore F. Keehler, & M. M. Keehler, executor and executrix of C. D. Keehler, deceased.

This was an action of debt against the defendant O. A. Keehler, and the other defendants, his sureties on his official bond as the late postmaster at Salem, North Carolina, dated the 15th day of
2 April, 1853, which said bond is in the words and figures following, to wit:

Know all men by these presents, that we Orestes A. Keehler, of Salem, in the county of Stokes, State of North Carolina, and C. D. Keehler and T. F. Keehler, are held and firmly bound unto to the United States of America, in the just and full sum of twelve (12) hundred dollars, for the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

In witness whereof, we have hereunto subscribed our names, and affixed our seals, this the fifteenth (15) day of April, in the year of our Lord one thousand eight hundred and fifty-three, (3.)

The condition of the above obligation is such, that whereas the above bounden O. A. Keehler is postmaster at Salem aforesaid: Now if the said O. A. Keehler shall well and truly execute the duties of said office, according to law and the instructions of the Postmaster General, and faithfully, once in three months, or oftener if thereto required, render accounts of his receipts and expenditures, as post-
master to the Post Office Department, in the manner and form
3 prescribed by the Postmaster General in his several instructions to postmasters, and shall pay the balance of all moneys that shall come to his hands for the postage of whatever is by law chargeable with postage in the manner prescribed by the Postmaster General of the United States for the time being; and shall keep safely,

without loaning, using, depositing in banks, or exchanging for other funds, than as allowed by law, all the public money collected by him, or otherwise at any time placed in his possession and custody, till the same is ordered by the Postmaster General to be transferred or paid out; and when such orders for transfer or payment are received, shall faithfully and promptly make the same as directed; and shall also faithfully do and perform, as agent and depository for the Post Office Department, all such acts and things as may be required of him by the Postmaster General; and, moreover, shall faithfully account with the United States, in the manner directed by the said Postmaster General, for all moneys, postage stamps, bills, bonds, notes, drafts, receipts, vouchers, and other property and papers, which he, as postmaster, or as agent and depository as aforesaid, shall receive from or for the use and benefit of the said Post Office Department, then the above obligation shall be void, otherwise of force.

4 [SEAL.] ORESTES A. KEEHLER.
[SEAL.] C. D. KEEHLER,
[SEAL.] THEO. F. KEEHLER.

Witness:
GEO. FOLTZ.
TIMOTHY VOGLER.

I hereby certify, that I am well acquainted with C. D. Keehler and T. F. Keehler, who have signed the foregoing bond, and with their pecuniary condition, and that they are good and sufficient sureties, severally, for double the amount of the penalty in the foregoing bond.

J. A. LASH, *J. P.*

5 The execution of the bond was admitted. The pleas were conditions performed, conditions not broken, and specially that the balance claimed by the plaintiff in this action, to wit, the sum of $330 03, had been paid over and delivered by the said Keehler to one E. T. Clemmons, on the 10th day of April, 1862, under the following circumstances, which constitute the case agreed.

At the breaking out of the late rebellion, in the spring of 1861, the United States was indebted to the said Clemmons for postal service in a sum exceeding the sum in the hands of this defendant, belonging to the plaintiff, and that the same has never been paid by the United States.

On the 31st day of May, 1861, the said Keehler had in his hands $330 03, which was received by him as postmaster at Salem, North Carolina, for the balance due on the quarterly returns of the defendant, and for amount received for postage stamps, and stamped envelopes sold by him and belonging to the government of the United States.

6 On the 30th of August, 1861, the congress of the so-called confederate states passed an act appropriating the balances at the date of the breaking out of the rebellion, in the hands of the several postmasters of the United States, who resided within the

limits of the states then in rebellion, to the pro rata payment of claims against the United States for postal service.

In pursuance of the said act, and in obedience to a regular official order from the Post Office Department of the so-called confederate states, directing him to pay to E. T. Clemmons the whole sum of money in his, the said Keehler's, hands, received for the United States previous to the 1st day of June, 1861, the said O. A. Keehler, on the 10th day of April, 1862, paid to the said E. T. Clemmons the said sum of $330 03, and the said Clemmons executed his receipt therefor to the said Keehler.

It is admitted that the United States post-office at Salem, North Carolina, in 1861, was a collection office, and that E. T. Clemmons was the mail contractor, named in his special instructions, to
7 whom the postmaster at Salem was required to pay over the net proceeds of his office quarterly, upon the production, by the said Clemmons, from time to time, of the proper orders and receipts from the post office department of the United States.

It is further admitted that throughout the year 1862, the so-called confederate government had force sufficient at its command to enforce its orders, and did enforce the orders of said government, in that part of North Carolina in which Salem is situated, and that no protection was afforded to the citizens of that part of the State by the government of the United States during that period.

If, on this state of facts, the United States is entitled to recover, it is agreed that judgment shall be entered against the defendants for the penalty of the bond, to be discharged upon the payment of $444 83-100, of which the sum of $330 03 is principal money. If the court shall be of a contrary opinion, the United States will enter a retraxit.

ED. GRAHAM HAYWOOD,
Att'y for Defendants.
D. H. STARBACK,
U. S. Dis'ct Att'y.

8 This case coming on to be argued at this term, upon the foregoing case agreed, it occurred as a question whether, notwithstanding the payment of the sum claimed by the plaintiff, as stated in the case agreed, the United States is not now entitled to recover. On which question the opinions of the judges were opposed.

Whereupon, on a motion of D. H. Starback, esquire, district attorney, that the point on which the disagreement hath happened, may, during the term, be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court to be finally decided, it is now ordered that the same be certified accordingly.

9 UNITED STATES OF AMERICA,
North Carolina District:

I, Nathaniel J. Kiddick, clerk of the circuit court for the district of North Carolina, do hereby certify the foregoing to be a true copy from the minutes.

Given under my hand and the seal of office at Raleigh, on the 14th day of October, in the year of our Lord one thousand eight hundred and sixty-seven.

[SEAL.] N. J. KIDDICK, *Clerk.*

In the Supreme Court of the United States.

DECEMBER TERM, 1869.

THE UNITED STATES, *Plaintiffs*,
vs.
ORESTES A. KEEHLER, *et al.*
} No. 22.

BRIEF FOR THE UNITED STATES.

This case is brought here upon a certificate of division in opinion between the judges of the circuit court of the United States for the district of North Carolina, in an action of debt against the defendant, O. A. Keehler, and the sureties on his official bond as postmaster at Salem, N. C., dated April 15, 1853.

The execution of the bond (which appears in the printed Record, pages 1 and 2) was admitted; and the defence set up was, that the balance claimed by plaintiffs, viz: $330 03, had been paid over by Keehler to one E. T. Clemmons, April 10, 1862, under the following circumstances, which were agreed to:

"At the breaking out of the late rebellion, in the spring of 1861, the United States were indebted to the said Clemmons, for postal service, in a sum exceeding the sum in the hands of the defendant, belonging to the plaintiff, and the same has never been paid by the United States. On the 31st of May, 1861, the said

Keehler had in his hands $330 03, which was received by him as postmaster at Salem, N. C., for the balance due on the quarterly returns of the defendant, and for amount received for postage stamps and stamped envelopes sold by him, and belonging to the Government of the United States. On the 30th of August, 1861, the Congress of the so-called Confederate States passed an act appropriating the balances at the date of the breaking out of the rebellion in the hands of the several postmasters of the United States who resided within the limits of the States then in rebellion to the *pro rata* payment of the claims against the United States for postal service. In pursuance of the said act, and in obedience to a regular official order from the Post Office Department of the so-called Confederate States, directing him to pay to E. T. Clemmons the whole sum of money in his the said Keehler's hands, received for the United States previous to the 1st day of June, 1861, the said O. A. Keehler, on the 10th of April, 1862, paid to the said E. T. Clemmons the said sum of $330 03, and the said Clemmons executed his receipt therefore to the said Keehler. It is admitted that the United States post office at Salem, N. C., in 1861, was a collection office, and that E. T. Clemmons was the mail contractor named in his special instructions, to whom the postmaster at Salem was required to pay over the net proceeds of his office quarterly, upon the production, by the said Clemmons, from time to time, of the proper orders and receipts from the Post Office Department of the United States.

It is further admitted that, throughout the year 1862, the so-called Confederate Government had force sufficient at its command to enforce its orders, and did enforce the orders of said government in that part of North Carolina in which Salem is situated, and that no protection was afforded to the citizens of that part of the State by the government of the United States during that period.

Upon argument it occurred as a question "whether, notwithstanding the payment of the sum claimed by the plaintiff, as stated in the case agreed, the United States is not now entitled to recover;" on which question the opinions of the judges were opposed.

The bond in this case was taken under the provisions of section 3 of the act of March 3, 1825, (4 Stat., 103,) the 13th section of the act of July 2, 1836, (5 Stat., 82,) and section 6 of the act of August 6, 1846, (9 Stat., 60;) and the suit was instituted by the requirements of section 31 of the act of March 3, 1825, (4 Stat., 112.) In behalf of the United States the following points are submitted:

1. The defendant, Keehler, was liable to the United States for the public moneys that came into his hands, not as a bailee, but on his official bond; and nothing but the transfer or payment thereof, *pursuant to the orders of the Postmaster General, or other competent authority*, could relieve him from that liability. (See section 6, act of August 6, 1846, 9 Stat., 60; United

States *vs.* Prescott, 3 How., 588; United States *vs.* Morgan, 11 How., 162.)

2. Public policy requires that every depositary of the public money should be held to a strict accountability.

Accordingly, in the case in 3 Howard, above cited, the "felonious taking and carrying away of the public moneys in the custody of a receiver of public moneys, *without any fault or negligence on his part*," was held to be no defence to an action against him and his sureties on his official bond. In the case in 11 Howard, which was a suit on a collector's bond, he was held responsible where Treasury notes were received by him in payment of duties, and were cancelled, but were lost or stolen without his knowledge or consent. And the ruling in these cases was affirmed in United States *vs.* Dashiel, 4 Wall. 185.

3. The act of the so-called Confederate Congress, sequestrating or confiscating the balances due from postmasters to the United States, and the order of the so-called Confederate Government made in pursuance thereof, directing the defendant, Keehler, to pay over the public moneys in his hands, did not discharge the bond.

Keppell's Admr. *vs.* Petersburg R. R. Co., 3 Am. Law Review, 389.

Shortbridge *vs.* Mason, 2 Am. Law Review, 95.

The circumstance that the payment was made to a creditor of the United States is immaterial; for even though the defendant himself had been that creditor,

yet his claim would not have been good, by way of set-off, unless it was shown to have been previously submitted to the proper accounting officers and by them rejected, which does not appear to have been done in the case stated. (United States *vs.* Hawkins, 10 Peters, 132.)

4. A loss occasioned by *vis major*, or irresistible force, is not within the condition of the bond, does not relieve from its performances and, therefore, constitutes no defence to an action on the bond.

Congress has, as it would seem, acted upon a similar view concerning the responsibility of postmasters, in making provision for the relief of loyal postmasters where they have been robbed of public money, &c., held by them, without their default or negligence, by Confederate forces or rebel guerillas. (See act of April 29, 1864, 13 Stat., 62, and also sec. 2, act of March 3, 1865, *ibid* 505.)

E. R. HOAR.
Attorney General.

W. A. FIELD,
Assistant Attorney General.